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Supreme Court of the United States

OCTOBER TERM 1944

ABRAHAM JESKOWITZ,

Petitioner,

against

LEONARD H. CARTER, Trustee in Bankruptcy of Union Fabrics, Inc.,

Respondent.

PETITION FOR REHEARING

ARCHIBALD PALMER,
Attorney for Petitioner,
320 Broadway,
Borough of Manhattan,
New York 7, N. Y.

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PETITION FOR REHEARING

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of ABRAHAM JESKOWITZ respectfully shows:

FIRST: That heretofore your petitioner filed a petition for a writ of certiorari to review the order and decree of the Circuit Court of Appeals for the Second Circuit entered on August 2, 1944, affirming an order of the United States District Court for the Southern District of New York dated May 6, 1943. The order of the District Court affirmed the order of the Referee in Bankruptcy dated February 23, 1943. *This petition for writ was denied by this Court on December 11, 1944.*

SECOND: A turnover proceeding was instituted by the Trustee in Bankruptcy on or about October 25, 1940, charg-

ing petitioner, as president and sole stockholder of Union Fabrics, Inc., with having failed to account for merchandise valued at $69,921.24, the proceeds of a certain ring amounting to $824, and the following books and papers alleged to have been under his control: journal for year 1938, general ledger for year 1937, inventory sheets for the years 1937, 1938 and 1939, and all purchase invoices for the year 1937.

THIRD: On October 21, 1941, an amended petition was filed directing your petitioner to show cause why he should not turn over to the Trustee 187,363⅛ yards of silks and other textiles upon the theory that the Union Fabrics, Inc., the bankrupt, had on hand on January 1, 1939, merchandise of the cost or value of $194,785.05 and upon the further theory that the merchandise was sold at a price not less than cost during the period between January 1 and September 28, 1939. The Trustee contended, during the course of the hearing, that the missing records were necessary to establish the cost of the merchandise sold during the said period and therefore relied upon the provisions of Section 21-L of the Bankruptcy Act, which under such circumstances entitled the Trustee to treat the said merchandise as having been sold at a price not less than cost. The contention of the Trustee was accepted by the Referee and the mathematical computation made by the Trustee's accountant based upon such theory was accepted by the Referee.

FOURTH: The foregoing placed upon petitioner the burden to establish the exact cost of the merchandise sold during the period between January 1, 1939 and September 28, 1939, which petitioner was unable to do because of his financial inability to retain an accountant to make an examination of the books and records to ascertain the cost. Not only that but your petitioner did not know at that time that the books and records of the Union Fabrics, Inc., which were

turned over to the Trustee in Bankruptcy, were sufficient to establish exactly the cost of the merchandise sold during the period.

FIFTH: No proof was adduced before the Referee that your petitioner was actually in possession of this merchandise or the proceeds thereof but the turnover order was based upon this mathematical computation and his finding that theoretically your petitioner was in possession of this property as of the date of the assignment for the benefit of creditors which preceded the filing of the petition in bankruptcy in 1939.

SIXTH: The Referee, in making the turnover order on February 23, 1943, also relied on the presumption that if theoretically your petitioner was in possession of this property or its proceeds on September 28, 1939, then he continued in possession of the property until February 23, 1943, when the turnover order was made.

SEVENTH: When this matter came on before the Circuit Court of Appeals, Circuit Judge Frank, who wrote a concurring opinion, stated as follows:

> "I concur but with the hope, expressed by Judge Learned Hand in Robbins v. Gottbetter, 2 Cir., 134 F. 2d 843, 844, and Seligson v. Goldsmith, 2 Cir., 128 F. 2d 977, 978, 979, that the Supreme Court will soon grant certiorari in some such case as this and overrule precedents that fasten upon us what seems to him and me an irrational rule of presumption, obviously contrary to fact, which enables trustees in bankruptcy to employ civil actions as substitutes for criminal proceedings."

EIGHTH: In connection with the argument submitted in support of petitioner's application for a writ of certiorari three points were discussed, as follows:

A.

> There is a conflict of authority within the Circuit Court of Appeals for the Second Circuit on the question of when a trustee may rely on a presumption of continued possession resulting in the suggestion by the Circuit Court of Appeals for the Second Circuit, in its recent decisions, that this question be reviewed and finally determined by the Supreme Court of the United States.

and in support thereof petitioner's counsel cited such cases as:

Seligson v. *Goldsmith,* 128 Fed. (2d) 977, wherein Circuit Judge Learned Hand expresses the considered opinion that the Supreme Court, which has never committed itself to the presumption of continued possession, should finally determine the question and at page 979 stated as follows:

> "The Supreme Court has never committed itself to the presumption, and perhaps at some time may think it desirable finally to determine the question."

Robbins v. *Gottbetter,* 134 Fed. (2d) 843, wherein the Circuit Court expresses the view again that they were following the earlier decisions against their better judgment and, at page 844, states as follows:

> "The whole proceeding is, to the minds of us two, an abuse of the process of the Bankruptcy Court; but, until the Supreme Court, which has never really considered the matter, sees fit to change the law as it has been settled, we regard ourselves as concluded."

In re Danish v. *Sofranski,* 93 Fed. (2d) 424, wherein the same Circuit Court held that the trustee was obliged to prove not only that the respondents had wrongfully abstracted the money but how much of it they had in their hands when the Referee's order passed.

In re Schoenberg, 70 Fed. (2d) 321, where the Circuit Court of Appeals, at page 323, stated as follows:

> "But the turnover order cannot stand. A turnover order presupposes that the person against whom it is directed has possession of the property or money which he is directed to deliver up. In re Redbord, 3 F. (2d) 793 (C. C. A. 2). In the case at bar the trustee made no attempt to show what part of the merchandise originally transferred was still on hand or that the appellant had the sum of money which in the alternative it was directed to pay over."

And *In re Matter of Pinsky-Lapin & Co.,* 98 Fed. (2d) 76, which distinctly shows the conflict existing within the Circuit Court of Appeals for the Second Circuit.

These cases not only show a conflict of opinion among the Judges of the Second Circuit but also express a desire on their part that the Supreme Court should consider the question and determine it.

B.

There is a conflict of authority on the question of presumption of continued possession among several circuits on the question of law involved in the case at bar, and there should be a unanimity of opinion among the various circuits with regard to this question.

In support of this point there were cited the following cases decided in the Circuit Court of Appeals for the Second Circuit which support the presumption of continued possession:

Matter of Pinsky-Lapin & Co. (cited supra);
In re H. Magen Co., 10 Fed. (2d) 91;
In re Steinreich Associates, Inc., 93 Fed. (2d) 254.

There was also cited *Marin* v. *Ellis* (C. C. A. 8), 15 Fed. (2d) 321, which holds a contrary view to that of the Second Circuit.

There was cited *In re J. L. Marks* (C. C. A. 7), 85 Fed. (2d) 392, which holds that the burden is upon the trustee to actually prove present possession rather than rely upon a presumption of continued possession, and also *In re Samel* v. *Dodd* (C. C. A. 5), 142 Fed. 68, which followed the line of decisions that the trustee should establish possession of the property in the respondent without regard to the presumption.

C.

The Trustee did not offer any proof to show that petitioner had, at the date of the turnover order, any property of the bankrupt, although the law requires that the Trustee establish all the elements of a turnover proceeding by clear and convincing proof.

In support thereof counsel to your petitioner cited such cases as:

Oriel v. *Russell,* 278 U. S. 358, 49 S. Ct. 173;
Boyd v. *Glucklich,* 116 Fed. 131, 140;
Epstein v. *Steinfeld,* 210 Fed. 236.

NINTH: In addition to making the application for a writ of certiorari your petitioner had also filed a petition with the Referee in Bankruptcy for an order to reopen the turnover proceedings and permit testimony to be taken upon certain issues raised by the said petition. The petition, among other things, alleges that after the Circuit Court of Appeals rendered its decision your petitioner sought the advice of the firm of Morris Gotthilf & Company, certified public accountants, and Archibald Palmer, an attorney, with respect to this matter. Said accountants made a study of the proceedings and an analysis of the books and records and from said study and analysis came to the conclusion that the firm of David Berdon & Company, the accountants for the Trustee, were entirely in error when they testified that the books and records which were necessary to obtain the actual cost of the merchan-

dise sold by the bankrupt between January 1 and September 28, 1939, were missing. Morris Gotthilf, senior member of the firm of Morris Gotthilf & Company, in an affidavit submitted in support of said petition to reopen the turnover proceeding stated that it is his considered opinion that it was then and is now possible to compute the cost of the merchandise sold from the books and records which had been in the possession of the Trustee in Bankruptcy as follows:

(a) *Sales Book*—This book contains an original duplicate copy of the bill given or sent to the customers, showing in detail the information as to when the merchandise was sold, identifying the merchandise by the Union Fabrics, Inc., quality number, Union Fabrics, Inc., piece good number, the yardage sold and the sales price.

(b) *Perpetual Inventory Book*—This book contains the account of the piece goods bought and indexed by the Union Fabrics, Inc., quality number. This quality number refers to the Union Fabrics, Inc., piece goods number, the mill greige goods number, dye lot number, quantity received and quantity shipped.

(c) *Dye Book*—This book contains the following information: The name of the dyer, date returned from the dyer, name of the greige goods mill, greige goods quantity number, mill number, yardage sent to the dyer, and the finished yardage returned by the dyer. This book also indicates the shrinkage, if any, in the dyed goods.

TENTH: Your petitioner argued, through his counsel before the Referee, that if he is able to establish through the testimony of his present accountants or through the cross-examination of the accountants for the Trustee that they did have in their possession at the time of the pendency of the turnover proceedings books and records from which they could ascertain the cost of merchandise sold

during the period in question then the finding of the Referee, which was based upon the presumption that the sales price was not less than the cost, would of necessity have to be changed and the actual cost of the merchandise sold would have to be substituted for the figure based upon the legal presumption that the sales price was not less than the cost price of the merchandise sold and the burden of establishing the cost price of the goods sold would, under such circumstances, be upon the Trustee and not upon the petitioner. The amount of the turnover could under no circumstances be the same in the event the Trustee were required to establish from the books and records the cost of the merchandise sold during the period instead of relying upon the presumption afforded the Trustee by Section 21-L of the Bankruptcy Act by reason of the testimony given by the Trustee's accountants that the books and records from which the cost price of the sales could be ascertained were not available.

ELEVENTH: The Referee denied the motion to reopen the proceeding upon the ground that he had no jurisdiction to entertain such motion since petitioner had not obtained prior leave of the Circuit Court of Appeals to make said motion. An order to that effect was entered on November 29, 1944 and a copy of said order is annexed hereto and marked Exhibit A.

TWELFTH: If your petitioner's accountants are correct in the view taken by them, then the order of the Referee should be set aside and the Trustee directed to proceed to establish the allegations of his original petition de novo.

THIRTEENTH: Your petitioner is about to prepare an application to the Circuit Court of Appeals for leave to make a motion before the Referee to reopen the proceedings.

FOURTEENTH: Your petitioner, however, is informed that if this Court would entertain an application for a writ of certiorari it could settle the law as to presumptions of continued possession with respect to which the Second Circuit is in doubt and is in conflict with other circuits, and could refer the proceeding back to the Referee for the purpose of determining whether the books and records in the possession of the Trustee are sufficient from which to establish cost and if so to substitute the figure representing the cost price of the sales as actually obtained from the books and records in place and in stead of the figure included in the mathematical computation by reason of the presumption afforded to the Trustee by Section 21-L of the Bankruptcy Act.

FIFTEENTH: If the turnover proceedings are not permitted to be reopened and the Supreme Court does not allow a writ of certiorari your petitioner would have no further recourse and would be punished for contempt of Court for failure to comply with said turnover order even though your petitioner does not have and never did have the ability to comply with said order.

SIXTEENTH: Your petitioner is further informed that if a motion is made to punish him for contempt he can make no collateral attack upon the order and he could not plead as a defense that he does not and never did have the property or money referred to in the turnover order.

SEVENTEENTH: Your petitioner is of the opinion that justice will be best served not only in this matter but in other similar cases if a petition for a writ of certiorari is granted and the questions involved are considered and finally determined so that all persons who are placed in similar situations, whether they reside in the Second Judicial Circuit, Fifth Judicial Circuit, Seventh Judicial Circuit or Eighth Judicial Circuit are afforded an equal protection of the laws of this country. Under existing conditions your

petitioner is of the opinion that persons who are in a situation similar to your petitioner but who reside in the Fifth, Seventh or Eighth Circuits are afforded one type of relief, according to the interpretation of the laws of the United States in those circuits whereas citizens residing within the Second Circuit are treated differently because of a different interpretation of the same laws of the United States. Your petitioner is of the opinion that such is not the equal protection of laws guaranteed by the Constitution, particularly in a case where liberty and freedom are at stake.

WHEREFORE, your petitioner respectfully prays that this Honorable Court grant a rehearing of the writ of certiorari and upon such rehearing grant the said application.

Dated, New York, December 18th, 1944.

ABRAHAM JESKOWITZ.

CITY OF NEW YORK,
COUNTY OF NEW YORK, } ss.:
STATE OF NEW YORK,

ABRAHAM JESKOWITZ, being duly sworn, deposes and says that he is the petitioner named herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

ABRAHAM JESKOWITZ.

Sworn to before me this
18th day of December, 1944.

DOROTHY J. RESNIKOF,
Notary Public,
Kings County.
Kings Co. Clk's No. 463, Reg. No. 145-R-5.
N. Y. Co. Clk's No. 527, Reg. No. 351-R-5.
Commission expires March 30, 1945.

Certificate of Counsel

I, ARCHIBALD PALMER, counsel to Abraham Jeskowitz, petitioner named in the petition for rehearing, hereby certify that the petition of Abraham Jeskowitz for a rehearing of the application for a writ of certiorari is presented in good faith and not for the purposes of delay.

Dated, New York, December 18th, 1944.

ARCHIBALD PALMER.

Exhibit A

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF UNION FABRICS, INC., Bankrupt.	In Bankruptcy No. 75326 ORDER

Abraham Jeskowitz, respondent in turnover proceedings herein, having moved this Court by order to show cause dated October 28, 1944 for an order reopening said turnover proceedings and permitting additional testimony therein and the same having come on to be heard before me on November 16, 1944 and November 21, 1944,

Now, on reading the said order to show cause, the petition of Abraham Jeskowitz, verified the 27th day of October, 1944, the affidavit of Morris H. Gotthilf, sworn to the 27th day of October, 1944, and the affidavit of Archibald Palmer,

sworn to the 27th day of October, 1944, with proof of service thereof on the attorneys for Leonard H. Carter, Trustee in Bankruptcy herein, all in support of said motion, and on reading and filing the answer of Leonard H. Carter, Trustee in Bankruptcy herein, verified the 14th day of November, 1944, in opposition to said motion, and after hearing Archibald Palmer, Esq., in support of said motion, and Parker, Chapin and Flattau and Glass & Lynch, attorneys for the Trustee in Bankruptcy herein, by Sydney W. Carle, of counsel, in opposition thereto; and due deliberation having been had thereon, upon filing the memorandum of this Court, it is

ORDERED, that said motion be and the same hereby is denied in all respects upon the ground that I, as Referee, have no jurisdiction to entertain said motion since the petitioner has not obtained the leave of the Circuit Court of Appeals, Second Circuit, to make said motion; and

FURTHER ORDERED that the stay contained in the order to show cause dated October 28, 1944 be and the same hereby is vacated in all respects.

Dated, New York, New York, November 29, 1944.

(sgd) PETER B. OLNEY,
Referee in Bankruptcy.